90-1065

No. -

IN THE

Supreme Court of the United States

October Term, 1990

RANDALL REAM, *Petitioner,*

vs.

STATE OF INDIANA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Sixth and Fourteenth Amendments of the United States Constitution assure an accused the right to present relevant evidence which is favorable to the accused. This constitutionally guaranteed right, however, is tempered by the trial court's power to exercise discretionary authority in weighing the probative value of relevant evidence against the risks that the evidence might create collateral issues or confuse the jury or cause undue prejudice. This case presents the issue of whether an accused may be denied the right to present relevant evidence which is favorable to the accused notwithstanding the absence of any determination by the trial court that a sound basis exists for the exclusion of the evidence.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

Petitioner Randall Ream (Ream) respectfully prays that the Supreme Court of the United States issue a Writ of Certiorari to review the judgment of the Court of Appeals of Indiana entered in Cause No. 76A03-8903-CR-71 on June 14, 1990, in which the Court of Appeals of Indiana affirmed a judgment of conviction entered by the Steuben Circuit Court.

OPINION BELOW

The sentences imposed by the Steuben Circuit Court on September 26, 1988, in State of Indiana vs. Randall Ream, Cause No. 76C01-8711-CF-71, appear in the Appendix at page A-7.

The memorandum decision of the Court of Appeals, filed June 14, 1990, in Case No. 76A03-8903-CR-71, appears in the Appendix commencing at page A-1. The decision was not published.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a) and Rule 10 of this Court. The Court of Appeals filed its memorandum decision on June 14, 1990. Ream filed his Petition to Transfer on July 5, 1990, and the Supreme Court of Indiana denied the Petition to Transfer on October 4, 1990. The notice of denial of the Petition to Transfer appears in the Appendix at page A-9. This Petition for Writ of Certiorari is filed within ninety days from the date on which the Supreme Court of Indiana denied the Petition to Transfer and is timely pursuant to 28 U.S.C. §2101(d) and Rule 13.

CONSTITUTIONAL PROVISIONS INVOLVED

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, §1.

STATEMENT OF THE CASE

The State of Indiana charged Ream with having molested two nine-year-old boys, Todd Honaker and Tony Snell, while the boys attended a summer camp at which Ream was a counselor. At trial each boy testified concerning the alleged acts of molestation, and the accused denied the accusations. The State sought to bolster its case by repetition: Todd told his story, his mother told Todd's story, Deputy McClelland told Todd's story, and a tape recording from the investigation "told" Todd's story; Tony told his story, his mother told Tony's story, Deputy McClelland told Tony's story, and a tape recording "told" Tony's story.

Ream called as his first witness Dr. James P. Spink, a counseling psychologist. When the State successfully objected to testimony by Dr. Spink, Ream made an offer to prove, as set forth in the Appendix commencing at page A-10. The trial court agreed that Dr. Spink's testimony satisfied all criteria for testimony by an expert witness but rejected the evidence solely on the basis that it was not relevant.

Ream voiced his Sixth Amendment and Fourteenth Amendment contentions in the argument which he made to the Court of Appeals of Indiana, an excerpt from which appears in the Appendix at page A-18. The Court of Appeals held that the trial court had excluded relevant evidence when it rejected Dr. Spink's testimony:

> [E]vidence that he [Ream] was neither a homosexual nor a pedophile would clearly, we think, make the desired inference of his innocence more probable than it was without the evidence. It was therefore relevant . . . . [A-4.]

The Court of Appeals nevertheless refused to reverse the convictions.

When Ream filed his Petition to Transfer, he relied upon the briefs he had filed in the Court of Appeals, as permitted by Rule 11 of the Indiana Rules of Appellate Procedure.

REASONS FOR ALLOWANCE OF THE WRIT

The Court of Appeals of Indiana has decided an important question of federal law in a way that conflicts with applicable decisions of the Supreme Court of the United States.

In *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019, the Court wrote:

> Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

In a case in which Ream was charged with having molested two young boys, expert testimony that Defendant possessed no traits, either latent or overt, to indicate he was a homosexual or a pedophile was relevant, and the Court of Appeals found that the evidence was relevant. Nevertheless, the Court of Appeals allowed the convictions to stand.

First, the Court of Appeals reasoned, the admission of Dr. Spink's testimony might have led to a battle of experts. Nothing in the record supports such fear.

Secondly, the Court of Appeals expressed concern that the jury might have given excessive weight to unreliable expert evidence. Again, nothing in the record supports this concern; the trial court specifically acknowledged the reliability of the evidence. (A-14).

Thirdly, Indiana law recognizes that a trial court is vested with discretion to exclude relevant evidence if the trial court finds that the probative value of the evidence is outweighed by the risk of creating collateral issues, or by the risk of confusing the jury, or by the risk of unduly arousing the emotions of the jury. *Smith v. Crouse-Hinds Co.*, 175 Ind.App. 679, 373 N.E.2d 923 (1978). Such discretion, however, belongs to the trial court. The Court of Appeals may only review the trial court's exercise of that discretionary authority. In the instant

case, the trial court made no effort to engage in any balancing process. The Court of Appeals approved the exclusion of the evidence by means of exercising discretionary power which only the trial court possesses.

In *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), the Court referred to the wide latitude given trial court judges to exclude evidence which is repetitive or which poses an undue risk of confusing the issues. This balancing process is within the power of the trial court; it is not within the power of the reviewing court. In *Crane* the Court also wrote the following at page 690:

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, *supra*, [410 U.S. 284 (1973)] or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23 (1967); *Davis v. Alaska*, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S., at 485 . . . .

All of the acts of molestation were alleged to have occurred in a room approximately 29 feet by 28 feet while approximately twenty-four other people were present. At trial, none of those twenty-four other people testified to having any knowledge to support the boys' accusations. The evidence did include an account of the disciplinary problems which Todd Honaker had presented for Ream during Todd's stay at camp. The jury could reasonably have returned verdicts of not guilty. Instead, after deliberating for eight hours, the jury returned verdicts of guilty. The exclusion of Dr. Spink's testimony left the jury without knowledge that Ream possessed no traits to suggest he was a homosexual or a pedophile, according to testing deemed scientifically reliable. The exclusion of that evidence denied Ream a meaningful opportunity to present a complete defense.

CONCLUSION

Defendant has a right, guaranteed by the United States Constitution, to present relevant evidence. This right has been denied him. He prays that the Court will issue a Writ of Certiorari to review the judgment of the Court of Appeals of Indiana.

Respectfully submitted,

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Appendix

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IN THE
COURT OF APPEALS OF INDIANA

THIRD DISTRICT

RANDALL REAM, *Defendant-Appellant*	)	
vs.	)	No. 76A03-8903-CR-71
STATE OF INDIANA, *Plaintiff-Appellee*	)	

APPEAL FROM THE STEUBEN CIRCUIT COURT
The Honorable Dane L. Tubergen, Judge
Cause No. 76C01-8711-CF-71

GARRARD, J.

MEMORANDUM DECISION

Ream was tried by jury and was convicted on two counts of child molesting.

The facts favoring the verdict established that in the summer of 1987 two nine year old boys, T.H. and T.S., attended

Calvary Church Camp in Angola. Ream was a counselor in the boys' cabin.

Both boys related incidents during their four day stay at camp when Ream hugged and kissed them and fondled their genitals. At least twice Ream climbed into T.H.'s bed, took off his own underwear and fondled T.H.'s privates. At one point Ream removed T.H.'s underwear. On the last night of camp Ream summoned T.S. to Ream's bed and requested T.H. to get in. He pulled T.S. close to him and started rubbing the boy's penis through the boy's underwear. Ream then told T.S. to rub Ream's penis and placed T.S.'s hand on it.

After camp ended the boys told their parents and the ensuing investigation culminated in Ream's arrest and conviction.

Ream's first contention concerns information the state was permitted to elicit from him during cross examination.

During the state's case-in-chief it sought to show that Ream was accompanied by an attorney when he was first asked to appear for questioning. At that stage of the investigation, Ream had not been informed of the reason for the questioning except that he had been told that it was about something that happened at camp. The trial court ruled that reference to the attorney's presence would be unnecessarily prejudicial.

During his own redirect examination Ream testified that McClelland's questioning was quick and harsh and caught him off balance. When the defense finished its redirect the prosecutor was allowed to impeach Ream's testimony that he was caught off guard. This colloquy ensued:

Q: Mr. Ream, you just testified that Deputy McClelland's questions caught you off balance.

A: Yes, they did.

Q: Before you came to that interview at the Steuben County Sheriff's Department, had Deputy McClelland told you what he wanted to talk to you about?

A: I don't believe so, no.

Q: He just said he wanted to talk to you about something that happened at camp?

A: He called me on the phone, yes.

Q: And you said his questions caught you off balance?

A: Yes, sir.

Q: Didn't you, in fact, show up at the interview with an attorney?

A: You bet I did.

MR. STOUT: Again, I would like for the record to reflect that this gentleman, if, in fact, he did have an attorney with him, had that privilege by virtue of the benefit of the Sixth Amendment of the United States Constitution. For the record I wish to object to the line of questioning and ask that it be stricken as violative of that right to somehow suggest to the jury that because one embraces his right to remain silent or to have an attorney present, that somehow is some evidence of guilt. I don't believe that's what the Constitution intended and I object to it and I ask that it be stricken.

COURT: The questions weren't allowed for the purpose of inferring guilt, so the objection is overruled.

(Record, 536-38).

Ream's objection at trial is the basis for his argument upon appeal. That is, he claims that because "even the most innocent individuals do well to obtain counsel," *Bruno v. Rushen* (9th Cir. 1983), 721 F.2d 1193, 1194, bringing an attorney to the interrogation cannot be the basis of inferring guilt. Ream offers us excerpts from a host of cases which stand for the proposition that the prosecution cannot comment upon or offer evidence of an accused's consultation with an attorney to create an inference or indication of guilt. See, e.g., *United States ex rel. Macon v. Yeager* (3rd Cir. 1973), 476 F.2d 613.

Were that the issue here, reversal might have been required but, as the trial court noted, these questions were allowed for

impeachment purposes. Ream knew that the prosecution had previously sought to have this information put before the jury. The defense need not have broached the subject. Having invited the prosecution in, Ream cannot complain about the trespass upon his right to seek counsel. A statement or evidence otherwise objectionable may be justified by the fact that it was invited or provoked by the defendant. *Lopez v. State* (1988), Ind., 527 N.E.2d 1119, 1128. Here Ream testified that the questioning officer was rough and caught Ream off balance. The defense was suggesting that the state was harsh, vindictive, or prematurely conclusive in its investigation and charging. The prosecution's impeachment centering on the presence of defense counsel clears away the implication of impropriety raised by Ream's testimony. The trial court's ruling on the objection was not erroneous. *See, e.g., Delatorre v. State* (1989), Ind., 544 N.E.2d 1379.

Secondly, Ream contends the court erred in excluding the testimony of a psychologist who had examined Ream and was prepared to testify that his testing disclosed that Ream showed no tendencies of homosexuality or pedophilia. The trial court excluded the evidence as not relevant.

Indiana follows the rule that evidence is relevant so long as it has some tendency to prove or disprove a material fact. *Turpin v. State* (1980), Ind., 400 N.E.2d 1119, 1122. That is to say, the question is whether the evidence offered renders the desired inference more probable than it would be without the evidence. *Pirtle v. State* (1975), 263 Ind. 16, 323 N.E.2d 634. Ream and the victims were both male and the victims were both young boys. Thus, evidence that he was neither a homosexual nor a pedophile would clearly, we think, make the desired inference of his innocence more probable than it was without the evidence. It was therefore relevant, so the question becomes one of whether it was otherwise properly excludible. If it was properly excludible for any reason, there was no reversible error. *Eckman v. Funderburg* (1935), 183 Ind. 208, 108 N.E.

577; *Amer. United Life Ins. Co. v. Peffley* (1973), 158 Ind. App. 29, 301 N.E.2d 651, *rehearing denied* 306 N.E.2d 131.

The proffered testimony was derived from psychological tests and, admittedly, did not purport to determine whether Ream, in fact, molested the two boys. Instead its purpose was to state that Ream's personal characteristics were such that it was unlikely that he would commit such an offense. The general rule is that evidence of a person's character is not admissible to prove that person acted in a manner consistent with that character on a particular occasion. *Chapman v. State* (1984), Ind. App., 469 N.E.2d 50, 52; *McCormick On Evidence* (3d Ed.) §188. As *McCormick* points out, the reason is that the prejudice, distraction and time consumption may outweigh the probative value. *McCormick* at 554.

In the instant case were the evidence allowed the inevitability of a "battle of experts" is clear. Experts in the field of psychology are bound to differ, and it is unrealistic to suppose that the state will stand idly by without producing psychologists of its own. This will not only require excessive court time and cost to the parties, it may create a side issue focusing upon the reliability of the expert opinions rather than whether a defendant actually committed the acts with which he is charged. In this context it must also be noted that courts have recognized that a substantial danger exists that juries may give excessive weight to unreliable expert evidence simply because the evidence is labelled "scientific" or "expert." *See, e.g., New Jersey v. Cavallo* (1982), 88 N.J. 508, 443 A.2d 1020.

Thus, while a criminal accused may offer character evidence at his trial, the Indiana decisions have largely limited such evidence to a defendant's reputation for truth and veracity, *Kellar v. State* (1922), 192 Ind. 38, 134 N.E. 881, or his reputation for peace and quietude. *Kahlenbeck v. State* (1888), 119 Ind. 118, 21 N.E. 460. We find no error in the rejection of the testimony.

Finally, Ream argues that the court erred in admitting the testimony of Deputy McClelland recounting statements made by the boys and in admitting recordings of the boys' statements which were taped after McClelland's initial conversation.

Under *Patterson v. State* (1975), 263 Ind. 55, 324 N.E.2d 482 the statements were not excludible as hearsay. *Patterson* does not, however, preclude their exclusion on other grounds.

Ream also objected to their admission on the ground that they were cumulative and therefore prejudicial. The court is invested with discretion to reject cumulative evidence, and its ruling is reviewable only for an abuse of discretion. *Davis v. State* (1983), Ind., 456 N.E.2d 405, 409.

We have reviewed the objected-to evidence and find that it was not as egregious as that which required reversal in *Stone v. State (1989)*, Ind. App., 536 N.E.2d 534 (seven repetitions from six different witnesses). Thus, while repetitive use of the witness' statement may be properly precluded on the grounds that it is cumulative and prejudicial, we are unable to say that the court committed a clear abuse of discretion in permitting the evidence in this case.

The convictions are, therefore, affirmed.

STATON, J. and CHEZEM, P.J. Concur.

SENTENCING BY STEUBEN CIRCUIT COURT
STATE OF INDIANA VS. RANDALL REAM
CAUSE NO. 76C01-8711-CF-71
SEPTEMBER 26, 1988

IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT that the defendant, Randall Ream, having been adjudged guilty of the offense of Child Molesting, a class C felony as set forth in Count I filed November 9, 1987, and also having been adjudged guilty of Child Molesting, a class C felony as set forth in Count II filed November 9, 1987, be and he is hereby committed to the custody of the Department of Correction for classification and confinement for a period of five (5) years on each offense and that he be disfranchised and rendered incapable of holding any office of trust or profit during the term of such imprisonment and that he pay the costs herein.

IT IS FURTHER ORDERED that the sentences herein imposed for each offense be served concurrently. The Court further finds that reason of the character of the defendant and the facts and circumstances surrounding the commission of this offense, that the interests of society do not demand or require that the defendant be imprisoned for the full term as set forth above if, upon his release from incarceration, he shall hereafter behave well and comply with the terms of probation as herein set forth.

IT IS THEREFORE ORDERED that three (3) years of the above term of imprisonment be suspended and the defendant, following his release from incarceration, shall be placed on probation for a period of three (3) years upon the terms and conditions as set forth in a written probation order to be signed by the defendant and given to him as follows: (see R. 170).

If the defendant violates any of the terms of probation herein imposed, the Court may, after hearing, order the defendant to serve the remaining three years of imprisonment which have been suspended by this order.

On the executed portion of the sentence of incarceration of two years, the defendant shall receive sixteen (16) days credit for all days spent in confinement prior to sentencing. [Record 169-71.]

STATE OF INDIANA

CLERK OF THE SUPREME COURT
COURT OF APPEALS AND TAX COURT

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CAUSE NO.
76A03-8903-CR-00071
LOWER CAUSE
76C018711CF71

RANDALL REAM -VS- STATE OF INDIANA

You are hereby notified that the SUPREME COURT has on this day 10/04/90

APPELLANT'S PETITION TO TRANSFER IS HEREBY DENIED WITHOUT OPINION. RANDALL T. SHEPARD, CHIEF JUSTICE. ALL JUSTICES CONCUR.

WITNESS my name and the seal of said Court,
this 4th day of OCTOBER, 1990.

/s/ DAN HEISER

Clerk Supreme Court, Court of Appeals and Tax Court

OFFER TO PROVE

Q: Dr. Spink, you're here today are you not under subpoena?

A: Yes, I am.

Q: Dr. Spink, have you had occasion since November of 1987 to perform, at my request, a psychological evaluation of Randall Scott Ream?

MR. SHIVELY: Your Honor, at this point I would like to enter an objection. I don't believe psychological evidence or an examination of the defendant is admissible in a case such as this.

COURT: We'll need to have the jury shown out. You may go with the Bailiff.

(Jury exits the Courtroom)

COURT: Please state for the record, if you would, Mr. Stout, what questions you intend to ask him and what answers you expect to elicit.

MR. STOUT: Is this an Offer to Prove, Your Honor?

COURT: This is so I can evaluate — the objection initially at first (indiscernible) is well taken, but I would like to be able to explore it more and see what is relevant.

MR. STOUT: I intend to ask Dr. Spink if he in fact conducted, at my request, a psychological evaluation of Randall Scott Ream, when he did it. I will ask Dr. Spink specifically what tests were conducted on Mr. Ream. I'll ask Dr. Spink to explain what that particular test does, what a clinical psychologist uses that test for and the interpretation of those results. I will not ask Dr. Spink if, in his professional opinion, Randall Scott Ream molested these two children. I recognize that Dr. Spink was not present at the camp and would have no idea. I am going to ask Dr. Spink if Mr. Ream presented to him from a clinical psychological prospective [sic] evidence of drug or alcohol use or abuse; if he demonstrated from a psychological,

from a clinical, psychological prospective [sic] evidence of homosexuality, recognizing that that may or may not be evidenced by testing and that only Dr. Spink could tell us. I'm going to ask if Dr. Spink through his testing can discover evidence of homosexuality, latent homosexuality, or whatever, if through his testing he is able through the science of clinical psychology discover evidence of pedophilia or propensities of pedophilia and, if so, did Mr. Ream's psychological evaluations reflect any evidence of tendencies of homosexuality or pedophilia, both of which are underlying psychological whatever of the two charges that are initiated here. Again, and most importantly, I am not asking Dr. Spink, nor could he reasonably render an opinion, as to whether Mr. Ream is a nice man or not or if Mr. Ream on whatever date we're charged with fondling children did it. Dr. Spink would have no idea in the world. I merely am going to ask Dr. Spink if he can tell us from his testing, if he can tell us whether Mr. Ream has both oars in the water. That's not a term of art, but essentially that's what I'm asking him.

COURT: And what's the specific objection?

MR. SHIVELY: Your Honor, the evidence that Mr. Stout wishes to offer is not admissible under the caselaw of the State of Indiana as I read it, uh, evidence of the psychological profile to exclude him from homosexuality, he is not charged with being a homosexual, to exclude him from pedophilia, he is not charged with being a pedophile. He is charged with specifically fondling two young men. I don't believe that the evidence has sufficient probitive value. I believe that the introduction of the evidence will unfairly, excuse me, introduction of the evidence will unnecessarily delay the trial and that that delay and the lack of value and its inadmissibility would lead to an unfair situation. I don't believe the evidence is admissible under for what Mr. Stout has said it is. Mr. Ream is not charged with pedophilia. He is

not charged with homosexuality. He is charged with specific acts which could be committed by anyone, pedophile, heterosexual, anyone.

MR. STOUT: Your Honor, if I may respond. Mr. Ream is charged with fondling the genitals and apparently, by virtue of the reading of the charges and the statutes, with intent to sexually arouse either himself or the children. That is by definition pedophilia. Mr. Ream is undeniably a male, both of these children are undeniably male children. Those acts, if true, fondling of genitals and mutual exchange of genital fondling constitutes, according to my education, homosexuality. Admittedly, some of this information would be of no use if the alleged victims were female children. Again, I'm not asking the doctor to certify to this jury that Randy Ream is not a pedophile. I'm not asking him to certify to this jury that Mr. Ream is not a homosexual. I presume no one could ever tell that. But I also presume that the science of clinical psychology in applying the Frye standard, that it is recognized within the discipline of clinical psychology and certain testing and evaluation by clinical psychologists with the credentials of this man are able to determine evidence of or the sheer absence of, and I believe that that would be of some benefit to this jury where the case they're asking to be decide[d] is essentially the work [sic] of two people against one. We have nothing else frankly.

COURT: Well, I think it boils down to this. Assuming you meet the Frye test and Dr. Spink's testing would be, uh, the results of his testing would be admissible evidence under the Frye test, and that there's a scientific basis for his testing and that he's performed the tests correctly - -

MR. STOUT: - - and I would lay that foundation.

COURT: - - assuming that that's true, the question then is whether or not it tends to prove or disprove

the fact in issue, and I guess I don't think it does. This sounds like a broken record cause I think we did this once before and my feeling was the same in that case and I haven't seen anything to change my mind.

MR. STOUT: All right. So it'd be the Court's direction that Dr. Spink would not be able to testify concerning what?

COURT: I think it's irrelevant that he tested this gentleman psycholo - performed or administered psychiatric or psychological measuring tests on this gentleman unless he can testify that Mr. Ream by example is not homosexual and is not a pedophile and therefore would not have done this because only a homosexual or pedophile would have done this.

MR. STOUT: Maybe the doctor can testify to that, I don't know.

COURT: Well, if you want to make that Offer to Prove, I'll hear that, but otherwise I don't think it's relevant. I'd be surprised if he would say that.

MR. STOUT: May I ask the doctor. Will your test results and your testing results be able to lead you to that conclusion, as a result of your testing of this man and as a result of the references that you have made from his test results? I presume that there are standards available that you refer to much like we do law books. We don't keep it in our heads, we go to a book and look and see what it says. Are those standards available?

DR. SPINK: Yes.

MR. STOUT: Have you referred to those standards through the Multiphasic Data Analysis Corporation in Indianapolis?

DR. SPINK: Not only that, I sent his MMPI to the Multiphasic Data Analysis Corporation to get their results as well, and their results are - -

MR. STOUT: - - are those tests, doctor, such that are

recognized within the discipline of clinical psychology as being reliable?

DR. SPINK: Definitely.

MR. STOUT: They are reliable in Angola, Indiana, and the same test result would be reliable in Spokane or - -

DR. SPINK: - - New York.

MR. STOUT: - - New York. And based upon those test results and the evaluation made and the profile comparison through the Multiphasic Data Analysis Corporation that you've done, are you able to tell the Court clinically, tell this jury, whether or not a person is homosexual or a person is a pedophile?

DR. SPINK: According to the tests, both the Rorschach Inkblot, which is also a universally used test, as well as a clinical analysis questionnaire and the Multiphasic Personality Inventory, you can tell by those that a person has those tendencies or not; whether it's latent, whether it's overt or whether they have those tendencies or not. I'm - -

MR. STOUT: Is it possible for a person to have homosexual tendencies and never ever act them out?

DR. SPINK: It's possible for a latent homosexual to have tendencies and never act them out. In fact, many latent homosexuals never do act them out.

MR. STOUT: That's my offer, Your Honor.

COURT: Well, all that goes to the Frye test. In my analysis I'm willing to assume that the evidence meets the Frye test, that there are standards, that there is a scientific basis for the tests and that the tests were properly administered. Assuming that can be proved, it still begs the question of whether that fact tends to prove or disprove the matter at issue.

MR. STOUT: Of course it won't come in as any single piece of proof, as you've told the jury. Everything comes in in kinda bits and pieces, and admittedly this doctor cannot disprove the fact that Mr. Ream may have molested those children. He can't disprove that at all.

COURT: It's gotta either make it more likely than not that it occurred or it didn't occur.

MR. STOUT: Well, I think perhaps - Doctor, would your testimony be such, are you able to testify under oath that it is more likely than not, based upon your testing, that Mr. Ream did molest these children or that Mr. Ream did not molest these children. Armed with his psychological evaluation and psychological makeup, are you able to tell the jury that?

DR. SPINK: I can tell the jury without a question that in my own judgment, based upon these tests, that Randall Ream does not show any latent or overt homosexual tendencies.

MR. STOUT: I understand. Are you able to tell the jury that it is more likely that he did molest these children?

DR. SPINK: Well, I don't think that's in my perusal to make that statement.

MR. STOUT: All right. Are you able to tell the jury, based upon vour psychological testing and evaluation, that it is more likely that he did not.

DR. SPINK: It is more than likely from what I see from his tests that he did not.

MR. STOUT: But you don't know for sure do you?

DR. SPINK: No. I can only go on the test results.

MR. STOUT: All right. Your Honor, I'd offer it as that bit and piece of building the house that you've told the jury about. Again, I'm not - and I'll make it very clear to the jury that this doctor, this person,

has no more idea of what went on in there than any of us here, aside from Randy Ream, and who will testify.

COURT: I think I'm going to stick with my initial ruling.

MR. STOUT: May I incorporate by reference rather than a complete recitation of this soliloquy, may I incorporate by reference our hearing here as my Offer to Prove?

COURT: Surely.

MR. STOUT: And the record will reflect that as my Offer to Prove?

COURT: Yes.

MR. STOUT: Will the Court permit me to have the doctor testify that in fact a psychological evaluation was given and the results of his evaluation?

COURT: I think that's what was objected to.

MR. STOUT: The results as far as, uh, that I won't use it to try to defend him. I will merely attempt to use it to demonstrate to the jury that in fact this man does have both oars in the water. We'll limit it to that. I suppose at the very least it might go to some sliver of the man's character. You see there's some things you can hide about your character. I presume that Dr. Spink can tell you there are precious few things you can hide about your psychological makeup.

COURT: I think that that's what was objected to and that's what I sustained.

MR. STOUT: Okay, I give up then. Dr. Spink, I guess that's it. We won't be calling you back. I do want the record to reflect for, as long as we're absolutely clear on it, that the entire contents of this hearing, after the jury left until now, will be shown as, and incorporated by reference, as my Offer to Prove what would be proven and shown by Dr. Spink's testimony rela-

tive to these charges, recognizing that we have no criminal offense of homosexuality and pedophilia but they are certainly incorporated, those psychological aberrations are certainly incorporated into the offense of one man allegedly molesting by fondling the genitals of a male child. Thank you, doctor.

COURT: It will be considered an Offer to Prove.

MR. STOUT: Thank you. [Record 419-34.]

EXCERPT FROM BRIEF OF APPELLANT FILED IN COURT OF APPEALS OF INDIANA

The Sixth Amendment to the United States Constitution guarantees that an accused will have the right to present witnesses on behalf of the accused. This right guaranteed by the Sixth Amendment has been recognized as embodied in the due process requirements of the Fourteenth Amendment and therefore applying to proceedings in state courts. *Borst v. State* (1984), Ind.App., 459 N.E.2d 751. In *Camarillo v. State* (1980), Ind.App., 410 N.E.2d 1202 the Court of Appeals wrote the following:

> The Sixth Amendment right to a fair trial includes the right of a defendant to present a defense, including witnesses in his favor. *Washington v. Texas (1967)*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019. The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. *Chambers v. Mississippi* (1973), 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297.

(2)

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October Term, 1990

RANDALL REAM,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTION PRESENTED FOR REVIEW

Whether the male Petitioner, convicted of molesting two nine-year-old boys, was denied his constitutional right to present evidence on his own behalf when the trial court excluded as irrelevant his expert psychiatric evidence that he exhibited no latent or overt homosexual or pedophilic tendencies.

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Respondent, State of Indiana, respectfully urges the Court to deny the petition for a writ of certiorari to review the decision of the Court of Appeals of Indiana in cause no. 76A03-8903-CR-71.

OPINION BELOW

The unpublished opinion of the Third District of the Court of Appeals is reproduced in the Petitioner's appendix.

CONSTITUTIONAL PROVISIONS INVOLVED

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. United States Constitution, Amendment VI.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. United States Constitution, Amendment XIV, § 1.

STATEMENT OF THE CASE

Nine-year-olds Todd Honaker and Tony Snell attended Calvary Church Camp in Angola, Indiana in the summer of 1987. The Petitioner was one of the counselors assigned to the boys' cabin. Twice the Petitioner climbed into Todd's bed, removed Todd's underwear, and fondled Todd's genitals. On the last night of the boys' four-day stay,

the Petitioner fondled Tony's genitals through his underwear and placed Tony's hand on his (Petitioner's) erect penis.

REASONS FOR DENIAL OF THE WRIT

The petition should be denied because the decision by the Indiana Court of Appeals rests on adequate non-federal grounds.

While Petitioner did partially base his argument before the Court of Appeals on the Sixth and Fourteenth Amendments, the Court of Appeals decided the issue without reference to those constitutional underpinnings. In such a situation, this Court will determine whether Indiana's non-federal, State ground independently and adequately support's the judgment. *Staub v. Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); *Wood v. Chesborough*, 228 U.S. 672, 676-80, 33 S.Ct. 706, 57 L.Ed.18 (1913). While the Court of Appeals' silence regarding the constitutional question is not conclusive, if the non-federal ground is adequate the Court will decline review. *Chicago, B & Q.R. Co. v. Illinois ex rel. Com'rs*, 200 U.S. 561, 580-81, 26 S.Ct. 341, 50 L.Ed. 596 (1906).

The decision of the Court of Appeals rests upon an independent and adequate State ground. The Court of Appeals affirmed the exclusion on the basis of two evidentiary rules of general application in Indiana: that character evidence is not admissible to prove that a person acted in a manner consistent with that characteristic on a particular occasion; and that character evidence is limited to a person's reputation for truth and veracity, or peace and quietude. The Court of Appeals envisioned a real probability that the disadvantages sought to be prevented by the rules

would develop: that the prejudice, distraction, and time consumption would outweigh the probative value of the evidence. The Court of Appeals saw this occurring in the form of a "battle of experts", resulting in excessive court time and cost to the parties, and focusing the trial on the side issue of the reliability of the expert opinions rather than on whether the Petitioner committed the acts.

According to the standards articulated by this Court to evaluate the independence and adequacy of the State ground, the basis of the Court of Appeals' decision justifies denial of the writ.

First, the Court's reliance on the general rules governing character evidence was necessary and logically connected to the ultimate decision, was against the position of the Petitioner who claimed the constitutional right, and was broad enough to deny the claim and sustain the trial court ruling without reference to the federal ground. *Eustis v. Bolles*, 150 U.S. 361, 370, 14 S.Ct. 131, 37 L.Ed. 1111 (1893); *Murdock v. Memphis*, 20 Wall. 590, 636, 87 U.S. 590, 22 L.Ed. 429 (1874).

Second, the constitutional claim is not so interwoven with the State ground as not to be an independent matter; here the State ground is entirely independent. *Enterprise Irrigation Dist. v. Farmers' Mut. Canal Co.*, 243 U.S. 157, 164, 37 S.Ct. 318, 61 L.Ed. 644 (1917).

Finally, the State ground relied upon by the Court of Appeals is certainly tenable. *Lawrence v. St. Tax Comm'n*, 286 U.S. 276, 282, 52 S.Ct. 556, 76 L.Ed. 1102 (1932); *Ward v. Love Co.*, 253 U.S. 17, 22, 40 S.Ct. 419, 64 L.Ed. 751 (1920); *Enterprise*, 243 U.S. at 164.

CONCLUSION

The State of Indiana, as Respondent, respectfully urges that the petition for a writ of certiorari be denied.

Respectfully submitted,

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